

No. 78728-0
Court of Appeals No. 33174-8-II

THE SUPREME COURT
OF THE STATE OF WASHINGTON

LONGVIEW FIBRE CO., INC.,

Petitioner,

V.

STACY L. HEGWINE,

Respondent.

AMICUS CURIAE BRIEF BY
THE WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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IDENTITY AND INTEREST OF AMICUS

The Washington Employment Lawyers Association ("WELA") has approximately 100 members and is a chapter of the National Employment Lawyers Association ("NELA"), a non-profit organization. WELA's members are Washington attorneys who primarily represent employees in employment law matters including cases brought under RCW 49.60.

SUMMARY OF ARGUMENT

This is a case of sex discrimination. The court of appeals correctly held that Longview Fibre Company, Inc., unlawfully discriminated against Stacy Hegwine when it refused to employ her because of a pregnancy related condition. Washington's Pregnancy Discrimination Regulation explicitly prohibits an employer from considering pregnancy related conditions in any employment action, unless the employer can establish the strict and narrow affirmative defense of business necessity. The company's claim that business necessity prevented it from employing Ms. Hegwine fails as matter of law, assuming that defense was not waived below. Moreover, an employer must provide a non-discriminatory leave of absence to any woman who, due to pregnancy, is or becomes temporarily unable to perform a job for which she is otherwise qualified, unless the employer can show business necessity for

denying the leave. The court of appeals properly ruled that a disability law-based reasonable accommodation analysis is flatly inconsistent with the Pregnancy Discrimination Regulation. The Human Rights Commission's reasonable interpretation of its legislative mandate to enact regulations guaranteeing equal employment opportunities for women is entitled to strong deference. This Court should affirm the judgment of the court of appeals.

ARGUMENT OF COUNSEL

A. The Refusal to Employ a Woman Because of a Pregnancy Related Condition Is Sex Discrimination as a Matter of Law.

The court of appeals stated the obvious when it noted that “only women get pregnant.” *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 560, 132 P.3d 789 (2006), *rev. granted*, 159 Wn.2d 1001 (2007). That basic biological fact is, however, what makes pregnancy discrimination factually and legally sex discrimination.

Washington is firmly opposed to unlawful discrimination in all of its forms. *See, e.g.*, RCW 49.60.010; *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 309-310, 898 P.2d 884 (1994). This State has, however, made a special commitment to equality for women. There is “no more appropriate place to glean a state’s fundamental policies than its state constitution.” *Roberts v. Dudley*, 140 Wn.2d 58, 78, 993 P.2d 901 (2000) (Alexander, J., concurring). The Equal Rights Amendment provides that

“[e]quality of rights and responsibility under the law shall not be denied or abridged on account of sex.” Const. Art. XXXI, § 1 (amend. 61). This provision “unquestionably reflects a fundamental *public policy* against discrimination in employment—public and private—on account of sex.” *Roberts*, 140 Wn.2d at 78 (Alexander, J., concurring) (quoting *Rojo v. Kliger*, 52 Cal. 3d 65, 801 P.2d 373, 389, 276 Cal. Rptr. 130 (1990)).

The voters adopted the Equal Rights Amendment in 1972. Section 2 of that Amendment gave the Legislature “the power to enforce, by appropriate legislation, the provisions of this article.” In 1973, the Legislature added new prohibitions against sex discrimination to RCW 49.60.010 & RCW 49.60.030(1). See Historical and Statutory Notes to RCW 49.60.010 & RCW 49.60.030, Title 49, *West's Revised Code of Washington Annotated*, at pp. 343 & 353 (1988). Thus, when the Legislature enacted these additional prohibitions on sex discrimination in employment, it acted under a state constitutional mandate.

Until the 1970s, laws limiting the employment opportunities of women were both pervasive and judicially sanctioned. See *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721, 729, 123 S. Ct. 1972, 155 L. Ed. 2d 953 (2003). These laws were based on the related beliefs that (1) a woman is, and should remain, the center of home and family life; and (2) a proper discharge of a woman's maternal functions justifies protective

legislation limiting the employment opportunities of women. *See id.* Even after the enactment of Title VII in 1964, women continued to face “pervasive, although at times more subtle, discrimination in the job market.” *Id.* at 730 (internal quotations omitted). Such discrimination was “traceable directly to the pervasive presumption that women are mothers first, and workers second.” *Id.* at 736. “This prevailing ideology about women’s roles has in turn justified discrimination against women when they are mothers or *mothers-to-be.*” *Id.* (emphasis added) (internal quotation omitted).

Courts were not immune from these stereotypes. Until 1971 clearly established law provided that women could be denied opportunities accorded men as long as “any basis in reason . . . could be conceived for the discrimination.” *Hibbs*, 538 U.S. at 729 (internal quotation omitted). In the 1970s six members of the United States Supreme Court twice held that discrimination on the basis of pregnancy was legally *not* sex discrimination, but rather discrimination in favor of “nonpregnant persons.” *Geduldig v. Aiello*, 417 U.S. 484, 497, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1974) (upholding disability insurance program that exempted from coverage any work loss resulting from normal pregnancy); *General Electric Co. v. Gilbert*, 429 U.S. 125, 134-36, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976) (same).

Both time and the law have thoroughly repudiated the notion that discrimination on the basis of pregnancy, or a condition caused by pregnancy,

is anything other than discrimination on the basis of sex. Congress disapproved the Supreme Court's refusal to recognize that pregnancy discrimination is sex discrimination by enacting the Pregnancy Discrimination Act ("PDA") of 1978. The PDA amended Title VII to provide that discrimination "because of sex" or "on the basis of sex" includes discrimination on the basis of "pregnancy, childbirth, or related medical conditions." *See* 42 U.S.C. § 2000(e)(k).

Washington had already outlawed pregnancy discrimination five years before. The Human Rights Commission ("HRC") originally promulgated the Pregnancy Discrimination Regulation ("PDR"), WAC 162-30-020, in 1973, immediately after the Legislature's addition of the prohibitions on sex discrimination to RCW 49.60.010 and 030. The HRC strengthened the PDR in 1999. *See* WAC 162-30-020. Twenty-six years after the PDR's initial enactment, the HRC continued to find that "discrimination against women because of pregnancy or childbirth lessens the employment opportunities of women." WAC 162-30-020(2). The PDR makes it unlawful for an employer to "refuse to hire or promote, terminate, or demote, a woman . . . because of pregnancy or childbirth." WAC 162-30-020(3). The PDR defines "pregnancy" to include "pregnancy related conditions." WAC 162-30-020(2)(a). "'Pregnancy related conditions' include, but are not limited to, related medical conditions. . . ." WAC 162-30-020(2)(b).

“[D]iscrimination based on a woman’s pregnancy is, *on its face*, discrimination because of her sex.” *EEOC v. Newport News Shipbuilding & Dry Dock Co.*, 462 U.S. 669, 684, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (1983) (emphasis added). Longview Fibre Co., Inc., (“Fibre”) claims it denied Stacy Hegwine employment because of a lifting restriction. It is undisputed that Ms. Hegwine’s temporary inability to lift more than a certain amount of weight was a condition caused solely by her pregnancy. Fibre therefore denied Ms. Hegwine employment because of a pregnancy related condition. By definition this constituted denial of employment because of pregnancy and, in turn, because of sex.

The case of *International Union, United Automobile, Aerospace & Agricultural Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991), is directly analogous. There the Court held that an employer commits sex discrimination *per se* if it restricts a woman’s employment opportunities based on the fact she is “capable of bearing children.” 499 U.S. at 199. The Court further held that such a practice constitutes disparate treatment on the basis of sex, not disparate impact, regardless of the employer’s motives. “Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.” *Id.*

An employer engages in disparate treatment when it treats “a person in a manner which but for that person’s sex would be different.” *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 711, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (1978). If an employment practice fails this “simple test,” it is discrimination *per se*. *Newport News Shipbuilding*, 462 U.S. at 683. There is no getting around the fact that if Stacy Hegwine had been a man, she would not have been denied employment at Fibre because of a lifting restriction resulting from pregnancy. Therefore, as a matter of law Fibre excluded Ms. Hegwine from employment because of her sex.

B. An Employer May Refuse to Employ a Woman because of a Pregnancy Related Condition Only if it Can Establish a “Business Necessity” for Doing So.

1. The PDR Explicitly Provides that the Employer Has the Burden of Proof as to “Business Necessity.”

An employer may take pregnancy or a pregnancy related condition into account adversely to a woman only if “it can demonstrate business necessity for the employment action.” WAC 162-30-020(3)(b). Fibre claims the court of appeals erred when it held this regulation created an affirmative defense as to which the employer had the burden of persuasion. 132 Wn. App. at 566. Courts must apply normal rules of statutory construction to administrative regulations. *Mader v. Health Care Auth.*, 149 Wn.2d 458, 472, 70 P.3d 931 (2003). In the context of discrimination law,

“demonstrates” means “meets the burdens of production and persuasion.” See 42 U.S.C. § 2000e(m). Therefore, by its terms, the PDR establishes “business necessity” as an affirmative defense as to which the employer has both the burden of production and persuasion.

Fibre argues that the Court should either ignore or invalidate the plain language of the PDR because this Court held in *Kastanis v. Educational Employees Credit Union*, 122 Wn.2d 483, 492, 865 P.2d 507 (1993), that the plaintiff had the burden of proving business necessity with respect to a now-amended version of the marital status regulation, WAC 162-16-150. Fibre’s argument is not well taken. The regulation at issue in *Kastanis* was silent concerning which party had the burden of proof as to business necessity. By contrast, the PDR unambiguously places the burden of persuasion on the employer. Therefore, *Kastanis*, has no relevance to this case.

Furthermore, in the 14 years since *Kastanis*, it has become an established principle of employment discrimination law that business necessity is an affirmative defense as to which the employer has the burden of proof. One of the cases upon which *Kastanis* relied was *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115, 104 L. Ed. 2d 733 (1989). 122 Wn.2d at 493-94. Congress has disapproved the holding of *Wards Cove* and requires the defendant to bear the burden of proof regarding business necessity in Title VII cases. 42 U.S.C. § 2000e-2(k)(1)(A)(i).

Courts have uniformly held that “business necessity” under the Americans with Disabilities Act, 42 U.S.C. §§ 12112(b)(6), is an affirmative defense as to which the employer bears the burden of persuasion. *See, e.g., Cripe v. San Jose*, 261 F.3d 877, 890 (9th Cir. 2001); *Lavia v. Pennsylvania, Dep’t of Corrections*, 224 F.3d 190, 199 (3rd Cir. 2000); *Belk v. Southwestern Bell Tel. Co.*, 194 F.3d 946, 951 (8th Cir. 1999).

For all these reasons, the court of appeals correctly held that Fibre had the burden to prove business necessity under the PDR.

2. Because Business Necessity Under WAC 162-30-020(3)(b) is a Defense to a Claim of Disparate Treatment, it Must Be Construed in Light of the BFOQ Defense.

“Business necessity” is traditionally an affirmative defense to a claim of disparate impact discrimination, not a claim of disparate treatment. *Fahn v. Cowlitz County*, 93 Wn.2d 368, 379-80, 620 P.2d 857 (1980). The proper defense to a claim of disparate treatment is an employer’s proof of a “bona fide occupational qualification” (“BFOQ”). *Id.* The WLAD allows a BFOQ defense for all forms of discrimination with respect to hiring, RCW 49.60.180(1), but makes no mention of a business necessity defense.

The PDR, however, permits a business necessity defense to claims of both disparate treatment, WAC 162-30-020(3)(b) & WAC 162-30-020(4)(c), and disparate impact, WAC 162-30-020(4)(b). Where an enactment makes “business necessity” a defense to both disparate treatment and disparate

impact claims, a court should interpret that term in light of both the traditional business necessity defense and the traditional BFOQ defense. *Morton v. United Parcel Serv., Inc.*, 272 F.3d 1249, 1263 (9th Cir. 2001).

The traditional business necessity standard is quite high. *Cripe*, 261 F.3d at 890. It is not to be confused with mere expediency. *Id.* To meet this burden, the employer must demonstrate “a significant correlation” between the qualification and important aspects of the job in question. *Morton*, 272 F.3d at 1260. An employer must show the qualification standard in question “is necessary for the operation of the employer’s business.” *Cripe*, 261 F.3d at 890. The test for business necessity is more stringent than the undue hardship standard that applies in reasonable accommodation cases. *Id.*

The traditional BFOQ defense imposes an even higher burden on the employer than does the business necessity defense. *International Union, United Automobile, Aerospace & Agricultural Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201, 111 S. Ct. 1196, 113 L. Ed. 2d 158 (1991). Courts have interpreted the BFOQ defense narrowly and restrictively. *Id.* The employer must show the job qualification at issue is not “idiosyncratic,” but rather relates to the “essence” or “central mission of the employer’s business.” *Id.* at 201, 203; *accord* WAC 162-16-240.

The Court need not resolve here the precise contours of the PDR’s business necessity defense to disparate treatment on the basis of pregnancy.

Fibre arguably waived its business necessity defense by failing to plead and prove one in the trial court. *See* CR 8(c). In any event, Fibre cannot show that refusing to employ Ms. Hegwine because of her temporary lifting restriction was “necessary for the operation of its business,” let alone “essential” to the business’s “central mission.” Therefore, the court of appeals properly directed the entry of judgment in favor of Ms. Hegwine.

3. An Employer Must Provide a Leave of Absence to a Woman who, Due to Pregnancy, is Temporarily Unable to Perform Her Job, unless it can show Business Necessity.

Assuming Fibre could show that business necessity required Ms. Hegwine to perform certain job tasks that her pregnancy temporarily did not permit, this would not be sufficient to justify her exclusion from employment. The PDR requires employers to provide, upon request, a leave of absence for the period of time a woman is temporarily disabled from performing her job because of pregnancy. WAC 162-30-020(4)(a). An employer can deny this leave of absence only if (1) its general leave policies do not otherwise provide for the necessary leave and (2) it can show business necessity for having such restrictive leave policies. WAC 162-30-020(4)(b). The employer must reinstate the employee to her original or equivalent position, absent a showing of business necessity. WAC 162-30-020(4)(c).

Fibre argues that the leave obligations of the PDR do not apply to newly hired employees. In fact, the PDR specifically contemplates the hiring

of a pregnant applicant who will need an immediate leave of absence, unless the employer can demonstrate business necessity. WAC 162-30-020(3)(b). That provision allows an employer to refuse to hire a pregnant applicant who will need an immediate leave of absence into a required training program if that program cannot accommodate an immediate leave of absence. Therefore, absent proof of business necessity, an employer must hire an otherwise qualified pregnant job applicant even if she will need an immediate leave of absence because of her pregnancy.

C. Fibre's Importation of a Disability Discrimination Analysis into the PDR Contradicts the Plain Language of the Regulation.

This Court should reject Fibre's attempt to jettison the PDR's carefully constructed structure for preventing sex discrimination on the basis of pregnancy and to substitute disability discrimination law in its place. Fibre argues that because the WLAD's prohibition on *disability* discrimination does not apply "if the particular disability prevents the proper performance of the particular worker involved," RCW 49.60.180(1), the same limitation must apply to claims for pregnancy discrimination.

Claims brought under the PDR are, by definition, claims of sex discrimination, not disability discrimination. WAC 162-30-010 provides that this "chapter interprets and implements the sex discrimination protection of RCW 49.60.180, and provides guidance regarding certain specific forms of

sex discrimination.” The purpose of WAC 162-30-020 is to “explain[] how the law applies to employment discrimination practices that disadvantage women because of pregnancy or childbirth.” WAC 162-30-020(1). The Legislature deliberately created a “proper performance” exception *only* for claims of disability discrimination and not for claims of sex discrimination. This Court should decline Fibre’s invitation to re-write RCW 49.60.180(1).

Fibre argues the PDR contains an implicit exemption with respect to the hiring of a woman who, solely due to pregnancy, temporarily cannot perform the essential functions of the job for which she has applied. The history of the PDR belies Fibre’s claim. Until 1999 the PDR expressly permitted an employer to refuse to hire a pregnant woman if it showed its decision was “based on adequate facts concerning her individual ability to perform the job.” WAC 162-30-020(3) (1973). The PDR eliminated this justification for pregnancy discrimination in 1999. A court cannot give continued effect to a provision of an enactment that has been deleted. *See State v. Motherwell*, 114 Wn.2d 353, 359, 788 P.2d 1066 (1998).

The Court should also reject Fibre’s suggestion to import a reasonable accommodation/undue hardship analysis into the PDR. Such concepts are foreign to the language, structure, and purpose of the regulation. “Reasonable accommodations are mechanisms to remove barriers or provide assistance to disabled individuals so that they can perform the ‘essential functions’ of

employment positions.” *Cripe v. San Jose*, 261 F.3d 877, 889 (9th Cir. 2001).

An employer never is required to eliminate the “essential functions” of a job as a reasonable accommodation of a disabled employee. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 534, 70 P.3d 126 (2003).

The PDR is not a reasonable accommodation statute. The PDR forbids employers from discriminating on the basis of pregnancy absent a showing of business necessity. The PDR’s leave provisions provide pregnant women with substantive legal rights, analogous to those provided by the state and federal family leave acts. *See Bachelder v. America West Airlines Inc.*, 259 F.3d 1112, 1122 (9th Cir. 2001). A business necessity defense is narrower than the undue hardship defense to claims for failure to accommodate. *See Cripe*, 261 F.3d at 890. Reasonable accommodation law is inconsistent with the PDR and would greatly undermine its effectiveness.

There is no reason for this Court to import disability discrimination law wholesale into the law of pregnancy discrimination. Most pregnant women will not be “disabled” under *McClarty v. Totem Elec.*, 157 Wn.2d 214, 228, 137 P.3d 844 (2006), because a normal pregnancy does not qualify as an ADA disability. *See Richards v. Topeka*, 173 F.3d 1247, 1250 n.2 (10th Cir. 1999) (collecting cases). It may be that some pregnant women will suffer complications so severe that they become entitled to the protections of the disability discrimination laws. *See, e.g., Cerrato v. Durham*, 941 F. Supp.

388, 393 (S.D.N.Y. 1998). A court should analyze a disability discrimination claim based upon the complications of pregnancy just like any other disability discrimination claim. But that truism provides no support for Fibre's assertion that a court should analyze the sex discrimination claim of a pregnant woman as if it were a disability discrimination claim.

The PDR's use of the terms "disabled" and "disabilities" in reference to the employer's obligation to provide a leave of absence does not somehow convert a claim for a breach of that regulation into a claim for disability discrimination. "Disability" in WAC 162-30-020(4) obviously has a different meaning than in WAC 162-22-020 (the regulation rejected in *McClarty*). "[M]ost words have different shades of meaning and consequently may be variously construed," especially when they occur in different enactments. *See Environmental Defense v. Duke Energy Corp.*, No. 05-848, 2007 WL 957002 (U.S. Apr. 2, 2007) at *8. "Context counts." *Id.* at *9.

The context of WAC 162-22-020 and 162-30-030(4) are entirely different. WAC 162-22-020 defined "disability" for the purposes of RCW 49.60's prohibition on disability discrimination. The purpose of WAC 162-30-020(4) is to prevent an employer from discriminating on the basis of pregnancy with respect to its own disability leave policies. In this context "disability" clearly refers to a woman's being temporarily unable to perform her own job, which is why employees take disability leave. *See Geduldig v.*

Aiello, 417 U.S. 484, 489, 94 S. Ct. 2485, 41 L. Ed. 2d 256 (1974) (disabled means being “unable to perform [one’s] regular or customary work”); *see also* RCW 49.78.005(2) (family leave required by FMLA is in addition to “any leave for sickness or temporary disability because of pregnancy or childbirth.”) WAC 162-30-020(4) has nothing to do with disability discrimination as such.

In sum, the court of appeals correctly reasoned that claims brought under the PDR should be analyzed solely as claims of sex discrimination and not as claims of disability discrimination.

D. The PDR is Entitled to Strong Administrative Deference.

Fibre’s challenge to the court of appeals’ decision is really an attack on the validity of the PDR itself. That regulation is, however, entitled to strong administrative deference. The HRC is the state agency that has been given “general jurisdiction and power” to bring about the “elimination and prevention of discrimination in employment” because of sex. RCW 49.60.010. The governor appoints the members of the HRC with the advice and consent of the senate. RCW 49.60.050. The HRC’s legislative mandate includes the “power to adopt, promulgate, amend, and rescind suitable rules and regulations to carry out the provisions of this chapter, and the policies and practices of the commission in connection therewith.” RCW 49.60.120(3).

“[A]dministrative rules adopted pursuant to a legislative grant of authority are presumed to be valid and should be upheld on judicial review if they are reasonably consistent with the statute being implemented.” *Fahn v. Cowlitz County*, 93 Wn.2d 368, 374, 610 P.2d 857 (1980); accord *Chevron USA, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-844, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) (the agency’s construction of the statute need not be the only one it permissibly could have adopted). “A court must give great weight to the statute’s interpretation by the agency which is charged with its administration, absent a compelling indication that such interpretation conflicts with the legislative intent.” *Marquis v. Spokane*, 130 Wn.2d 97, 111, 922 P.3d 43 (1996); see also *Philips v. Seattle*, 111 Wn.2d 903, 908, 766 P.2d 1099 (1989). In addition, the statutory protections against discrimination are to be liberally construed. *Id.*

The PDR is founded on the recognition that only women face the prospect of becoming pregnant, whether by choice or otherwise. Men and women are not similarly situated with respect to the denial of equal employment opportunities on the basis of pregnancy or childbirth. The PDR takes pregnancy and childbirth into account and it responds to these inherent differences between men and women by giving women additional workplace protections. Washington law has long recognized that in certain contexts identical treatment may be a source of discrimination and that different

treatment may be necessary to open the doors of employment opportunity. *See Holland v. Boeing Co.*, 90 Wn. 2d 384, 388, 583 P.2d 621 (1978). The PDR applies this well-established legal principle to prevent the denial of equal employment opportunities because of pregnancy or childbirth.

The 1999 revisions to the PDR removed WAC 162-30-020(11), which provided that the regulation was “intended to be consistent with Title VII . . .” and federal pregnancy discrimination regulations. This deletion demonstrates the PDR is intended to furnish pregnant women greater rights than federal law does. The PDA does not pre-empt state regulations that give special benefits to pregnant women. *See California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987).

The PDR carefully balances a pregnant woman’s right to equal employment opportunities and an employer’s legitimate business interests. The policy choices the PDR makes are neither unreasonable nor in conflict with RCW 49.60. For example, the regulation requires employers to treat a woman’s workplace restrictions due to her pregnancy as part and parcel of the pregnancy, and forbids discrimination on the basis of those restrictions. This Court used similar reasoning when it held conduct resulting from a disability (such as a decrease in job performance) is legally part of that disability and not a separate basis upon which an employer can take an adverse action. *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 152, 94 P.3d 930 (2004).

The PDR requires an employer, absent a showing of business necessity, to hire a woman even when she cannot, due to pregnancy, perform parts of a job that might be considered “essential functions” under the disability discrimination law. Under workers compensation law, employers frequently assign to light duty workers who are temporarily disabled from performing their original positions. *See* RCW 51.32.090(4)(a). In the workers compensation context, employers regularly remove the essential job functions of employees who temporarily cannot perform them. The HRC made a reasonable policy choice by incorporating a similar principle into the PDR for women who are temporarily disabled by pregnancy or childbirth, except where the employer can show business necessity.

This is not a case like *Fahn v. Cowlitz County*, where the HRC regulation created a new category of protected individuals not covered by the WLAD. This Court invalidated the HRC’s height and weight regulation for that reason, and because it did not allow the employer a business necessity defense. 93 Wn.2d at 383-84. The PDR suffers from neither infirmity. The current PDR has been in effect for eight years. The Legislature has not expressed any dissatisfaction with its policy choices. The PDR represents a reasonable and permissible interpretation of the mandate to eliminate sex discrimination in employment. This Court should defer to it.

CONCLUSION

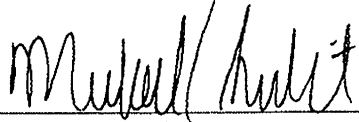
Fibre's treatment of Ms. Hegwine epitomizes the insidious sex discrimination that women still face in today's workplace because of pregnancy. The court of appeals correctly held that Fibre violated the PDR as a matter of law. This Court should uphold both the decision of the court of appeals and the PDR.

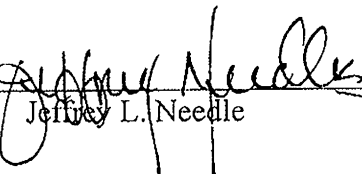
Respectfully submitted this 10th Day of April 2007.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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BY RONALD R. CARPENTER, Sandy Dennerline, declare that on this day I caused a copy of the

~~foregoing~~ Amicus Curiae Brief of Washington Employment Lawyers

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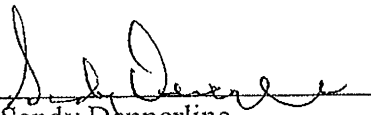
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Subject: Motion and Amicus Brief in Longview Fibre v. Hegwine

Please find enclosed Motion to File Amicus Brief and proposed brief to be filed with the Supreme Court. Thank you.

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